

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

FRANKIE DEAN WINTERHALTER,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Case No. CIV-21-1193-F
	)	
SCOTT NUNN,	)	
	)	
Respondent.	)	

**ORDER**

Petitioner Frankie Dean Winterhalter, a state prisoner appearing *pro se*, commenced this action by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2254. In the petition, he alleged the state court lacked jurisdiction over his criminal case based upon the Supreme Court’s ruling in McGirt v. Oklahoma, 140 S.Ct. 2452 (2020). The court referred the matter to United States Magistrate Judge Shon T. Erwin for initial proceedings in accordance with 28 U.S.C. § 636(b)(1)(B) and (C). After examining the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases, Magistrate Judge Erwin issued a Report and Recommendation (doc. no. 11), recommending the court dismiss the petition as untimely. Specifically, Magistrate Judge Erwin concluded the petition was untimely under 28 U.S.C. § 2244(d)(1)(A)-(D), was not subject to statutory or equitable tolling, and the “actual innocence” exception did not apply.


The court is in receipt of petitioner’s objection to the Report and Recommendation (doc. no. 12), triggering a de novo review by the court. Having conducted that review, the court concurs with the cogent analysis of Magistrate Judge Erwin. The court need not repeat that analysis here. Petitioner’s objection is

without merit. The court accepts, adopts, and affirms the Report and Recommendation in its entirety.

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to a petitioner. The court's dismissal of petitioner's § 2254 petition as untimely is such an order. *See, e.g., Clark v. Oklahoma*, 468 F.3d 711, 713 (10<sup>th</sup> Cir. 2006). Where the district court dismisses a petition on procedural grounds, such as in the instance case, a certificate of appealability may issue only if the petitioner shows both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon review, the court concludes that petitioner is not entitled to issuance of a certificate of appealability. A certificate of appealability is denied.

Accordingly, the Report and Recommendation (doc. no. 11) issued by United States Magistrate Judge Shon T. Erwin on February 24, 2022 is **ACCEPTED**, **ADOPTED**, and **AFFIRMED**. Petitioner Frankie Dean Winterhalter's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 is **DISMISSED** as untimely. A certificate of appealability is **DENIED**. Judgment shall issue separately.

IT IS SO ORDERED this 9<sup>th</sup> day of March, 2022.

  
STEPHEN P. FRIOT  
UNITED STATES DISTRICT JUDGE